

§ 108A-58.2. Waiver of transfer of assets penalty due to undue hardship.

(a) Prior to imposition of a period of ineligibility for long-term care services because of an asset transfer, also known as a penalty period, the county department of social services shall notify the individual of the individual's right to request a waiver of the penalty period because it will cause an undue hardship to the individual. The director of the county department of social services, or the director's designee shall grant a waiver of the penalty period due to undue hardship if the individual meets the conditions set forth in subsection (e) of this section. As used in this section, "long term care services" are those services described in 42 U.S.C. § 1396p(c)(1)(C)(i) and (ii).

(b) When a Medicaid applicant who is requesting Medicaid to pay for institutional care requests a waiver of a penalty period due to undue hardship, the determination of whether to waive the penalty period shall be processed as part of the Medicaid application and is subject to the application processing standards set forth in 10A NCAC 21B.0203.

(c) When an ongoing Medicaid recipient applies for institutional care or is receiving Medicaid payment for institutional care receives the notice described in subsection (a) of this section, the recipient has 12 calendar days from the date of the notice to request a waiver of the penalty due to undue hardship. The following are the procedures for processing the waiver request:

- (1) Within five work days of receipt of a request for a waiver of the transfer of assets penalty, the county department of social services shall notify the individual in writing of the information and documentation necessary to determine if the requirements for approving the undue hardship waiver are met.
- (2) The individual shall have 12 calendar days from the date of the notice specified in subdivision (1) of this subsection to provide the necessary information and documentation to establish the undue hardship.
- (3) If at the end of the first 12 calendar day period the necessary information and documentation has not been received by the county department of social services, the county department of social services shall again notify the individual of the necessary information and documentation. The individual shall be given an additional 12 calendar days to provide the information and documentation.
- (4) If the individual fails to request the undue hardship waiver within 12 calendar days from the date of the notice described in subsection (a) of this section, the county department of social services shall impose the transfer of assets penalty in accordance with notice requirements in G.S. 108A-79.
- (5) If by the end of the 12 calendar days from the notice described in subdivision (3) of this subsection, the necessary information and documentation has not been received by the county department of social services, the county department of social services shall deny the request for waiver of the penalty for undue hardship and notify the individual of the denial in accordance with G.S. 108A-79.
- (6) If by the end of the time allowed under subdivisions (2) and (3) of this subsection the county department of social services has received the necessary information and documentation, the county department of social services shall make a determination of whether the imposition of the penalty period would cause an undue hardship to the individual. The county department of social services shall complete the determination and notify the individual, pursuant to subsection (g) of this section, of whether the

imposition of the penalty period will be waived due to undue hardship within 12 calendar days of the receipt of the necessary information and documentation.

- (7) If as part of the determination described in subdivision (6) of this subsection the county department of social services identifies the need for additional information and documentation, it shall notify the individual in writing of that information and documentation. This notice shall initiate a new period of time for the individual to provide the information and documentation as set forth in subdivisions (2) and (3) of this subsection. Within 12 calendar days of the receipt of the additional information and documentation, the county department of social services shall complete the determination and notify the individual, pursuant to subsection (g) of this section, of whether the imposition of the penalty period will be waived due to undue hardship.

(d) As required by 42 U.S.C. § 1396p(c)(2)(D), the facility in which an institutionalized individual is residing may request an undue hardship waiver on behalf of the institutionalized individual with the written consent of the individual or the personal representative of the individual. A facility applying for a waiver for an individual residing in the facility shall adhere to the requirements of this section but shall not be required to advance the costs of acquiring an attorney to aid the institutionalized individual.

(e) Except as provided for in subsection (f) of this section, undue hardship exists if the imposition of the penalty period would deprive the individual of medical care, such that the individual's health or life would be endangered; or of food, clothing, shelter, or other necessities of life. The individual must provide the information and documentation necessary to demonstrate to the director of the county department of social services or the director's designee that:

- (1) The individual currently has no alternative income or resources available to provide the medical care or food, clothing, shelter, or other necessities of life that the individual would be deprived of due to the imposition of the penalty; and
- (2) The individual or some other person acting on the individual's behalf is making a good faith effort to pursue all reasonable means to recover the transferred asset or the fair market value of the transferred asset, which may include:
 - a. Seeking the advice of an attorney and pursuing legal or equitable remedies such as asset freezing, assignment, or injunction; or seeking modification, avoidance, or nullification of a financial instrument, promissory note, loan, mortgage or other property agreement, or other similar transfer agreement; and
 - b. Cooperating with any attempt to recover the transferred asset or the fair market value of the transferred asset.
- (3) The following definitions shall apply to this subsection.
 - a. "Health or life would be endangered" means a medical doctor with knowledge of the individual's medical condition certifies in writing that in his or her professional opinion, the individual will be in danger of death or the individual's health will suffer irreparable harm if a penalty period is imposed.
 - b. "Other necessities of life" includes basic, life sustaining utilities, including water, heat, electricity, phone, and other items or activities

that without which the individual's health or life would be endangered.

- c. "Income" means all income of the individual and the community spouse less a protected amount for the community spouse equal to the minimum monthly maintenance needs allowance as determined under 42 U.S.C. § 1396r-5(d), including in all circumstances the excess shelter allowance described under 42 U.S.C. § 1396r-5(d)(3)(A)(ii), without regard to any adjustment that would be made under 42 U.S.C. § 1396r-5(e), plus fifty percent (50%) of such income in excess of the protected amount.
- d. "Resources" means all resources of the individual and of the community spouse except the homesite in which the individual or community spouse has an equity interest not exceeding five hundred thousand dollars (\$500,000), a motor vehicle in which the individual or community spouse has an equity interest not exceeding thirty thousand dollars (\$30,000), personal property, and, in the case of a community spouse, a portion of such other resources in an amount equal to the community spouse resource allowance as defined by 42 U.S.C. § 1396r-5(f)(2), provided that such amount shall not exceed sixty percent (60%) of the maximum community spouse resource allowance as defined by 42 U.S.C. § 1396r-5(f)(2)(A)(ii). For purposes of this sub-subdivision, "homesite" means the principal place of residence of the individual or the community spouse in which the individual or community spouse has an equity interest.

(f) An undue hardship shall not exist when the application of a transfer of assets penalty merely causes the individual an inconvenience or restricts the individual's lifestyle.

(g) If the director of the county department of social services or the director's designee determines that:

- (1) An undue hardship exists, the county department of social services shall waive the penalty period and notify the individual of approval of the waiver of the penalty in accordance with G.S. 108A-79.
- (2) An undue hardship does not exist, the county department of social services shall deny the request for the waiver of the penalty and notify the individual of denial of the waiver request in accordance with G.S. 108A-79.

(h) During a penalty period that has been waived because of undue hardship, acquisition by the individual of new or increased income or resources shall be treated as a change in situation and evaluated pursuant to the rules adopted by the Department of Health and Human Services.

(i) While the determination on a request for a waiver of the penalty period due to undue hardship is pending, Medicaid shall not make payments for nursing facility services or intermediate care facility for the mentally retarded services to hold a bed for the individual, as described in 42 U.S.C. § 1396p(c)(2)(D). However, if the individual is institutionalized and receiving Medicaid payment for services, Medicaid will maintain the same level of services until the last day of the month after the latter of the following:

- (1) Expiration of the 10 workday period following the notice required by G.S. 108A-79, or
- (2) The date of the decision of a local appeal hearing described in G.S. 108A-79 is issued if the individual requests an appeal of the imposition of a transfer of

assets penalty period within the 10 workday period described in subdivision (1) of subsection (i) of this section. (2007-442, s. 3(a).)